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No. 06-1141

In the Supreme Court of the United States

OSCAR B. SHIRANI, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was required to show that his employer was aware of his protected activity and that his protected activity was a contributing factor in his termination in order to establish à violation of Section 211(b)(3)(C) of the Energy Reorganization Act, 42 U.S.C. 5851(b)(3)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 187 Fed. Appx. 631. The decision of the Department of Labor's Administrative Review Board (Pet. App. 9-32) is unreported. The recommended decision of the administrative law judge (Pet. App. 33-91) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2006. A petition for rehearing was denied on November 13, 2006 (Pet. App. 92). The petition for a writ of certiorari was filed on February 12, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 211(a) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851(a), prohibits discrimination against employees in the nuclear energy industry who engage in certain protected activities. The Secretary of Labor (Secretary) is responsible for investigating complaints of discrimination. After completing an investigation, the Secretary either issues an order denying the complaint or finds discrimination and provides relief. 42 U.S.C. 5851(b)(2).

The Secretary may find discrimination "only if the complainant has demonstrated that [protected activity] * * * was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). The Secretary may not order relief for discrimination "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]." 42 U.S.C. 5851(b)(3)(D).

Under the Secretary's regulations, either the complainant or the respondent can contest the results of an investigation by timely requesting a hearing before an administrative law judge (ALJ). 29 C.F.R. 24.4(d)(2). After a hearing, the ALJ issues a recommended decision on whether to find discrimination. 29 C.F.R. 24.6, 24.7. The Department of Labor's Administrative Review Board (Board) reviews the ALJ's decision and issues a final decision on behalf of the Secretary. 29 C.F.R. 24.8(a). The Board's final decision is reviewable in the court of appeals for the circuit in which the violation allegedly occurred. See 42 U.S.C. 5851(c)(1). The court of appeals reviews the Board's decision under standards provided by the Administrative Procedure Act. *Ibid.*

Under those standards, the court may overturn the Board's decision only if it is "unsupported by substantial evidence" or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A) and (E).

2. Petitioner is a former employee of Commonwealth Edison, an Illinois electric utility. Pet. App. 2, 39. In 1997, petitioner led an audit of a General Electric Nuclear Energy (GENE) facility. *Ibid.* Following that audit, petitioner recommended that Commonwealth Edison issue a stop-work order against GENE, and Commonwealth Edison issued such an order. *Ibid.* In 1998, David Helwig, a GENE manager who had argued with petitioner about the GENE audit, became a vice-president of Commonwealth Edison. *Ibid.* Petitioner asked Helwig for career advice, and he encouraged petitioner to stay in nuclear auditing because that was petitioner's area of expertise. *Id.* at 17, 53. Petitioner came to believe that Helwig was blocking his career in retaliation for the argument during the GENE audit. *Id.* at 2.

In 2000, petitioner conducted an audit involving "dry casks" that were used to store spent nuclear fuel. Pet. App. 2. The dry casks were supplied by Holtec International/U.S. Tool & Die Co. (Holtec). *Ibid.* In November 2000, petitioner attended a conference sponsored by Holtec and asked company officials about Holtec's compliance with his team's audit report. *Id.* at 2-3, 17. An official from the Nuclear Regulatory Commission (NRC) who attended the conference asked petitioner for a copy of the audit report. *Id.* at 3. In January 2001, after receiving the report, the NRC official asked petitioner why he had not issued a stop-work order. *Id.* at 3, 17. Petitioner stated that he was afraid of losing his job. *Id.* at 3.

In 2000, Commonwealth Edison's parent company merged with PECO Energy Corporation (PECO) to form respondent Exelon Corporation (Exelon). Pet. App. 3. Exelon required PECO and Commonwealth Edison employees to reapply for their positions. *Ibid.* Petitioner reapplied for his nuclear audit position and was selected for it, but he was turned down for management positions. *Ibid.* Discouraged by his inability to obtain a management position in Commonwealth Edison's nuclear section, petitioner sought a different audit position in Exelon's business services area. *Ibid.* The chief financial officer, Ruth Ann Gillis, knew that petitioner was unhappy in the nuclear division but was not aware of conflicts that had arisen in connection with the GENE and Holtec audits. *Id.* at 5-6. She selected petitioner for an internal audit position in the business services area and raised his salary from $86,887 to $94,000. *Id.* at 3, 19. Petitioner accepted the job with the understanding that it was an opportunity to learn new skills and that the internal audit area was undergoing organizational changes as a result of the merger. *Id.* at 3.

In April 2001, Gillis hired a general auditor, Ellen Caya, to develop the organizational structure in the business services area. Pet. App. 20, 62. Caya recommended a structure that generally retained existing salary levels. *Id.* at 22. To comply with company rules, however, she had to downgrade each salary level below her own. *Ibid.*; see *id.* at 3-4. Existing employees in the business services area then had to reapply for positions in the new structure and be selected to retain their employment. *Id.* at 3.

Petitioner chose not to apply for his current position because of its lower salary level. Pet. App. 3-4. Despite being warned that he might not be qualified, petitioner

instead applied for a management position. *Id.* at 4. In October 2001, Caya filled both managerial openings by selecting two individuals who, unlike petitioner, had strong financial audit and managerial backgrounds. *Id.* at 25. Caya testified that she knew nothing about petitioner's previous problems and that no one suggested to her that she should or should not select him. *Id.* at 6. Because he was not selected for the management position and had not reapplied for his auditor position, petitioner's employment was automatically terminated. *Id.* at 4. Petitioner then filed a complaint with the Department of Labor, alleging that Exelon fired him in retaliation for his 1997 GENE audit and the 2000 Holtec audit that he discussed with the NRC official. *Ibid.*

3. The ALJ recommended dismissing the complaint. Pet. App. 33-91. The ALJ concluded that a whistleblower complainant has the burden of proving a "*prima facie*" case of discrimination that includes proof that (1) he engaged in protected activity, (2) he was subjected to adverse action, (3) the employer was aware of the protected activity when it took adverse action, and (4) the evidence raises a reasonable inference that protected activity was the likely reason for the adverse action. *Id.* at 74. If the complainant meets that burden, the ALJ stated, the employer only has the burden of producing a legitimate nondiscriminatory reason for its actions. *Ibid.* If the employer meets that burden, the ALJ concluded, the complainant can prevail by proving by the preponderance of the evidence that the employer's reasons are not its true reasons but a pretext for discrimination. *Id.* at 74-75.

Applying those standards, the ALJ concluded that petitioner failed to establish two elements of a "*prima facie*" case. First, the ALJ found that petitioner failed

to prove that one or more of Exelon's employees who had input into the October 2001 hiring decision knew of his protected activity. Pet. App. 79-81. Second, the ALJ found no causal nexus between protected activity and the October 2001 hiring decision that led to petitioner's termination. *Id.* at 81-86. The ALJ further found that Exelon produced a legitimate, nondiscriminatory reason for terminating petitioner and that petitioner failed to prove that this reason was a pretext for discrimination. *Id.* at 86-88.

4. The Board agreed with the ALJ's recommendation and dismissed the complaint. Pet. App. 9-32. The Board stated that an employee establishes a violation of 42 U.S.C. 5851 by proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer subjected him to an adverse employment action, (3) the employer was aware of the protected activity, and (4) the protected activity was a contributing factor in the employer's decision to take adverse action. Pet. App. 26. The Board stated that because the case had been fully tried the ALJ should not have discussed those elements in terms of a complainant's "prima facie" case. *Id.* at 31. The Board also corrected the ALJ for stating that a complainant must show that protected activity was "the *likely* reason" for an adverse action, rather than "a contributing factor" in the action. *Id.* at 31-32 & n.3 (citation omitted).

Applying those proof requirements, the Board found that petitioner failed to establish employer knowledge of protected activity or a causal connection between his job loss and protected activities. Pet. App. 28-29. The Board found that "the overwhelming weight of the evidence" supports the ALJ's findings that the persons who had input into the decision not to hire petitioner in Octo-

ber 2001 were not aware of his safety activities and that there was no other evidence of a causal nexus between those activities and his nonselection. *Id.* at 28.

5. The court of appeals affirmed. Pet. App. 1-8. The court concluded that the Board's decision was not arbitrary, capricious, or an abuse of discretion. *Id.* at 5-6. The court stated that petitioner was required to establish that the officials involved in the decision not to hire him knew of his protected activity and that circumstances were sufficient to raise an inference that protected activity contributed to his termination. *Id.* at 5. The court found substantial evidence to support the Board's finding that petitioner's termination was not based on his protected activity. *Id.* at 6.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 4-5) that the court of appeals erred in holding that the framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), for cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, also applies to cases arising under the Energy Reorganization Act (ERA). That argument is not properly presented because petitioner did not raise it in the court of appeals until his reply brief and thereby waived it. *Porco* v. *Trustees of Ind. Univ.*, 453 F.3d 390, 395 (7th Cir. 2006). The court of appeals also did not purport to apply the *McDonnell Douglas* Title VII framework in this case. Instead, without any discussion of *McDonnell Douglas* or Title VII, the court held that petitioner was required

to prove that the officials involved in the decision not to hire him "knew of [petitioner's] protected activity" and "that the circumstances were sufficient to raise an inference that protected activity contributed to his termination." Pet. App. 5. Because the court below did not decide whether the *McDonnell Douglas* Title VII framework should apply to the ERA, that question is not properly presented here. *Holly Farms Corp.* v. *NLRB.*, 517 U.S. 392, 400 n.7 (1996).

Petitioner asserts (Pet. 5) that the court of appeals necessarily applied the *McDonnell Douglas* Title VII framework because it followed its earlier decision in *Hasan* v. *United States Department of Labor*, 400 F.3d 1001, 1004 (7th Cir.), cert. denied, 546 U.S. 892 (2005). In that case, the parties agreed that the Title VII standard for establishing a prima facie case of retaliation applies to retaliation cases under the ERA, and the court went on to analyze the case under that standard. But the court of appeals in this case did not even cite *Hasan*, much less purport to apply its analysis. Thus, assuming that the *Hasan* court adopted the *McDonnell Douglas* framework, rather than simply using it based on the parties' agreement, there is no basis for petitioner's claim that the court in this case applied the *McDonnell Douglas* Title VII framework.

2. To the extent that petitioner challenges the standards actually applied by the court of appeals in this case as inconsistent with the ERA, that challenge is without merit. The ERA requires a complainant to demonstrate that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). If the complainant makes such a showing, the burden shifts to the employer to "demonstrate[ ] by clear and convincing evidence that

it would have taken the same unfavorable personnel action in the absence of [protected activity]." 42 U.S.C. 5851(b)(3)(D). The court of appeals' holding that petitioner was required to show that the officials involved in the decision not to hire him "knew of [petitioner's] protected activity," and that "the circumstances were sufficient to raise an inference that protected activity contributed to his termination" (Pet. App. 5), is fully consistent with the ERA's statutory standards.

The court's requirement that petitioner show that "the circumstances were sufficient to give rise to an inference that protected activity contributed to his termination" (Pet. App. 5) is simply a restatement of the ERA's requirement that a complainant show that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). And the court's requirement that petitioner show that officials involved in the decision knew of petitioner's protected activity directly implements that statutory requirement. Unless a complainant can show that persons involved in the decision were at least aware of the protected activity, the complainant cannot begin to show that the protected activity was a contributing factor in the decision. Indeed, petitioner does not appear to contend that the court of appeals erred in holding that petitioner was required to make those two showings.

Instead, petitioner contends (Pet. 4) that the court of appeals deviated from the proper "contributing factor" standard when it stated that there was substantial evidence to support the Board's determination that petitioner's termination was not "based" on his protected activity. Petitioner's criticism is misguided. The court of appeals first announced that petitioner was required

to show that the persons involved in the hiring decision were aware of his protected activity and that his protected activity contributed to that decision. Pet. App. 5. It then cited Gillis' testimony that she was unaware of petitioner's conflicts over the GENE and Holtec audits, and Caya's testimony that she knew nothing about petitioner's previous problems and that no one had suggested to her that she should not hire petitioner. *Id.* at 5-6. The court then concluded that this testimony supplied substantial evidence to support the Board's determination that petitioner's termination was not based on his protected activity. *Id.* at 6. In context, the court's statement that substantial evidence supported the Board's determination that petitioner's termination was not "based on" protected activity was simply another way of saying that petitioner failed to meet the ERA statutory requirement of showing that his protected activity was a "contributing factor" in his termination.

Petitioner also contends (Pet. 4-5) that the court of appeals failed to apply the proper standard because it did not discuss whether the employer had proven through clear and convincing evidence that it would have taken the same action in the absence of petitioner's protected activity. But an employer's burden to make that showing arises only when the complainant has first shown that protected activity was a contributing factor in the adverse decision. Because the court of appeals affirmed the Board's finding that petitioner failed to satisfy his initial burden of showing that his protected activity was a contributing factor in the challenged decision, the court had no occasion to address whether the employer would have made the same decision even absent the protected activity.

3. Petitioner contends (Pet. 5-10), that the decision below conflicts with the decisions of other courts of appeals. There is, however, no conflict.

In *Doyle* v. *United States Secretary of Labor*, 285 F.3d 243, 249-251, cert. denied, 537 U.S. 1066 (2002), the Third Circuit stated that the 1992 amendments to the ERA "incorporate a burden-shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a 'contributing factor' in the unfavorable personnel decision." *Id.* at 249. Because the amendments did not apply to the case before it, the court did not address the standards to be applied in deciding whether an employee met that burden of persuasion under the amendments. *Id.* at 249-250. *Doyle* therefore had no occasion to address the question presented here.

In *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (1997), the Eleventh Circuit held that the ERA requires an employee to persuade the Secretary that protected activity was a contributing factor in an adverse action and then, if the employee succeeds, allows an employer to prove by clear and convincing evidence that it would have taken the same action in the absence of protected activity. The court affirmed the Secretary's findings that the employee in that case met his burden of showing he had suffered retaliation for engaging in protected activity while the employer did not meet its burden of showing it would have taken the same action in any event. *Id.* at 1573-1576. In discussing the employee's burden of proof, the Eleventh Circuit, like the court of appeals in this case, considered whether the employer was aware of the employee's protected activity and whether there was evidence that the employee's protected activity was a contributing factor

in the adverse action taken against the employee. *Id.* at 1573. *Stone & Webster* is therefore fully consistent with the Seventh Circuit's decision in this case.

In *Trimmer* v. *United States Department of Labor*, 174 F.3d 1098 (1999), the Tenth Circuit held that "[o]nly if the complainant meets his burden [of proving by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an unfavorable employment decision] does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Id.* at 1102. Applying that analysis, the court affirmed the Secretary's finding that the complainant failed to prove one of the elements of his case—an adverse employment action. *Id.* at 1103-1104. There is no inconsistency between that analysis and the court of appeals' decision in this case.

In *Williams* v. *Administrative Review Board*, 376 F.3d 471, 476 (2004), the Fifth Circuit concluded that the ERA requires an employee to prove that he engaged in protected conduct, that the employer was aware of that conduct, and that the employer took adverse action because of that conduct. While the court used slightly different terminology, that analysis corresponds to the analysis undertaken by the court of appeals in this case.

Thus, none of the decisions relied on by petitioner is in conflict with the decision below. Instead, they are consistent with that decision.

3. Petitioner's remaining contentions do not warrant review. Petitioner contends (Pet. 17) that the court of appeals improperly "ignored" his employer's alleged refusal to allow him to return to the nuclear section from the financial area. The court, however, did not ignore

petitioner's allegation. Instead, the court concluded that because petitioner did not point to anything in the record that indicated that petitioner applied and was turned down for a job that would have transferred him back to the nuclear section, his allegation was "too amorphous" to serve as concrete evidence of retaliation based on his status as a whistleblower. Pet. App. 7-8. The court's fact-bound conclusion does not warrant review.

Petitioner also contends (Pet. 17) that Caya knew that he had engaged in protected activity because she knew about the GENE audit and its unfavorable reception. That contention, however, incorrectly equates Caya's knowledge of the audit and its unfavorable reception with knowledge that the audit involved protected activity. See Pet. App. 29. In any event, that fact-bound contention does not warrant review.

Finally, petitioner asserts (Pet. 18) that he never applied for the managerial position for which he was not selected. But petitioner waived that contention by failing to raise it in the court of appeals until he filed his reply brief. See, *e.g.*, *Porco*, 453 F.3d at 395. The argument is also meritless because petitioner and other witnesses said he did apply for the position. See Pet. App. 23-25, 46, 65-66.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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